Supreme Court, U.S.
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In The

# Supreme Court of the United States

RODNEY W. LAUCK,

*Petitioner,*

v.

DEPARTMENT OF THE ARMY,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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## Petition for Writ of Certiorari

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## QUESTION PRESENTED

Whether the Merit Systems Protection Board and the United States Court of Appeals for the Federal Circuit's decisions upholding Petitioner's termination from Government employment were error as a matter of law where the evidence of record clearly demonstrated that the agency decision-maker prepared the decision memorandum terminating Petitioner's employment contemporaneously with the Notice of Proposed Termination and where the evidence clearly and positively demonstrated that the agency decision-maker failed to consider in any way prior to his issuing his decision Petitioner's submission including his defense and matters in mitigation and extenuation as required by law.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Rodney W. Lauck, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit rendered in this proceeding on March 26, 2002.

## OPINIONS BELOW

The decision of the Merit Systems Protection Board, *Lauck v. Department of the Army*, No. CH-0752-00-0283-I-1 (July 11, 2001), is reprinted as Appendix A.

The unpublished opinion of the United States Court of Appeals for the Federal Circuit, *Lauck v. Department of the Army*, No. 01-3225 (March 27, 2002) is reprinted as Appendix B.

## JURISDICTION

The United States Court of Appeals for the Federal Circuit affirmed the decision of the Merit Systems Protection Board on March 26, 2002. This Court possesses discretionary jurisdiction of this case pursuant to 28 U.S.C. § 1254(1), which entitles petitioner to seek review of the decision of the United States Court of Appeals for the Federal Circuit below. Service on the agency and on the Solicitor General has been effected pursuant to the provisions of Rule 29.4.

## RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

### *Statutes*

**5 U.S.C. § 7513. Cause and procedure**

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to –

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefore at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefore, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

*Regulations*

**ARMY REGULATION 690-700 ¶ 1-3**

b. **Formal disciplinary actions.**

(1) Formal disciplinary actions consist of written reprimands, suspensions, involuntary reductions in grade or pay and removals. Formal disciplinary actions are initiated by supervisors, with advice and assistance on appropriate penalties and other pertinent concerns from the servicing civilian personnel office (CPO). The CPO staff will assure appropriate oral or written coordination with the Labor Counselor on all formal disciplinary actions.

(2) At the time a notice of proposed formal disciplinary action is issued, the CPO staff will notify the deciding official of his or her role. (There is no proposal issued for a letter of reprimand). The deciding official will be advised (either by a personal briefing or through an information paper) of procedural and legal requirements in formal disciplinary actions including the requirement to remain impartial and objective. The advice to the deciding official will be the joint responsibility of the Employee Relations Specialist and the Labor Counselor. The advice should be tailored to the discipline proposed and should advise the decider of applicable case law so that he or she can make an informed and judicious decision. At this stage, the advice, if in writing, should not include "privileged" information such as an assessment of the evidence or any recommendation as to penalty.

(3) Decision notices should contain information demonstrating that the deciding official has considered all of the information available, both aggravating and mitigating. Such notices should also explain what weight was given to the aggravating factors in reaching the final decision, and reflect the deliberation of such official concerning the reasons for arriving at the judgment that the employee did or did not commit the offenses charged. * * Decision notices must be reviewed by the CPO staff and the Labor Counselor prior to delivery to the employee to ensure that the decision is procedurally sound and legally supportable. In the event that the decision notice cannot be delivered to the employee in person because of absence, notice may be delivered by mail. In such cases, proof of mailing should be established.

## 1-4. DETERMINING APPROPRIATE PENALTIES

a. Disciplinary actions under 5 U.S.C. 7503 and 7513 must not be arbitrary or capricious; the penalty selected must not be clearly excessive in relation to the offense and to prior practice, and must not otherwise be unreasonable.

## STATEMENT OF THE CASE

On December 30, 1999, Petitioner's employment as a civilian employee of the Department of the Army was terminated by the Army. Plaintiff sought timely review by the Merit Systems Protection Board ("MSPB") of the adverse agency personnel action terminating his employment. Following discovery, including depositions, a hearing was conducted in the MSPB Chicago office on June 2, 2000 before Administrative Judge Phillip Miller. Following the hearing, Judge Miller upheld the termination of Petitioner's civilian employment with the Department of the Army. Petitioner sought timely review of the Administrative Judge's decision by filing a Petition for Review with the Merit Systems Protection Board. On February 23, 2001, the Board affirmed Judge Miller's decision. (Appendix A)

Plaintiff timely noticed his intent to seek judicial review of the MSPB decision with the United States Court of Appeals for the Federal Circuit. On March 26, 2002, the United States Court of Appeals for the Federal Circuit, in an unpublished decision, affirmed the decision of the MSPB sustaining Petitioner's termination of employment. This Petition for Certiorari is timely filed in accordance with Rule 13 of this Court's rules.

## REASON FOR GRANTING THE WRIT

It has long been recognized that an agency is required to comply with the regulations that it publishes, particularly where those regulations provide the mechanisms of due process in an agency adjudication, formal or informal. *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (setting aside agency action where agency failed to comply with regulation); *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (concluding that "scrupulous observance of departmental procedural safeguards is clearly of particular importance" in agency decision-making); *Yellin v. United States*, 374 U.S. 109, 124 (congressional committee must be "equally meticulous in obeying its own rules"); *IMS, P.C. v. Alvarez*, 327 U.S. App. D.C. 126, 129 F.3d 618, 621 (D.C. Cir. 1997) (failure to follow regulations "is fatal to the deviant action").

This Writ involves review of agency procedure pursuant to the "arbitrary and capricious" standard and provides a textbook example of arbitrary and capricious agency action, depriving a citizen and Government employee of due process and sustained by the United States Court of Appeals for the Federal Circuit contrary to the clear precedent of this Court.

### *FACTS RELEVANT TO PETITION*

After a series of unavailing efforts to remove Petitioner from his Army civilian employment for a number of specious reasons found in the agency record, the agency stumbled upon information that Petitioner had been involuntarily separated from the Army Reserve for alleged misconduct. Army Reserve participation was a condition of Petitioner's employment. As a result of the

discovery, the agency on October 30, 1999 initiated proceedings, by Notification to Petitioner, seeking to terminate Petitioner's Army civilian employment for failure to maintain dual status as an Army Reserve officer.

Petitioner responded to the agency notification and informed his superiors in writing that he had been involuntarily separated from the Army Reserve without prior notification -- as indicated in the discharge materials found in his Army record. At the same time, Petitioner notified his agency that he had first learned that he had been involuntarily discharged from the Army without notice and in violation of the Army regulations governing military discharges when he received the Notification of Proposed Termination, and that this error could easily be corrected with an Application to the Army Board for Correction of Military Records, if Petitioner was provided a reasonable period of time in which to make such Application.

The agency discovery deposition of the agency decision-maker and uncontradicted testimony of the agency personnel specialist in the hearing before the Administrative Law Judge established that the final decision memorandum, by which the agency decision-maker actually terminated Petitioner's employment, was prepared at the very same time as the letter notifying Petitioner of the proposed removal, without any possibility of consideration of the information later provided by Petitioner in response to the Notification.

Importantly, in his own deposition testimony, the agency decision-maker testified under oath, when shown Petitioner's Response to Notification of Proposed

Termination *by agency counsel*, that he had never seen it before; was unfamiliar with the facts and arguments contained within Petitioner's written response; had not been briefed by anyone about the issues raised by Petitioner in his written response; and had not considered it in making the final decision terminating Petitioner's employment.

Further, and more importantly, when Petitioner's counsel queried the agency decision-maker about the specific facts and claims made by Petitioner in response to the Notification of Proposed Termination, including Petitioner's claim that he had been provided no notice of the Army's intent to discharge him from the Army Reserve, as required by statute and Army Regulation, the agency decision-maker professed no knowledge of any of the information contained within Petitioner's Response to Notice of Proposed Termination identifying the reasons Petitioner could not have known of his discharge from the Army Reserve.

Agency regulation and mandatory procedures admitted as exhibits at the MSPB hearing required that the agency decision-maker consider Petitioner's written response before making a decision to terminate Petitioner's employment. The unchallenged evidence of record indicates that Petitioner was denied *any* review by the agency decision-maker of the factual circumstances involved in his loss of dual status and that the agency decision-maker failed to consider the relative ease that plaintiff could rectify the clear error upon timely

consideration of the military discharge by the Army Board for Correction of Military Records.[1]

Clearly focused on the fact that Petitioner had lost his dual employment status, the MSPB and the Court below failed to address in any way the complete absence of agency adherence to regulations that required the agency decision-maker give consideration to Petitioner's Response to the Notice of Proposed Termination prior to taking final agency action. The agency decision-maker's failure to review Petitioner's Response to the Notification of Proposed Termination before effecting Petitioner's termination of employment is the type of procedural disfunction that warrants overturning agency decisions. *See Service v. Dulles*, 354 U.S. 363, 388 (1957); *see also Blassingame v. Sec'y of the Navy*, 866 F.2d 556, 559 (2d Cir. 1989); *Neal v. Sec'y of the Navy*, 639 F.2d 1029, 1035-36 (3d Cir. 1981). Moreover, despite an agency regulation requiring the agency decision-maker to address the matters submitted to him in his final determination, AR 690-700 ¶ 1-3b(3), the agency decision-maker failed in any way to *mention*, much less address the merits, of any of Petitioner's defenses or claims.

As Petitioner indicated in his Response, and as events with the Army Board for Correction of Military Records later demonstrated, Petitioner's involuntary military discharge without notice, which caused his loss of dual status, was erroneously imposed and later set aside. The failure of the agency decision-maker to

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[1]The Army Board for Correction of Military Records set aside Petitioner's involuntary military discharge on the same grounds of error asserted by Petitioner on March 18, 2002.

comply with agency regulations and to follow mandatory procedure requiring his consideration of Petitioner's Response denied Petitioner the process he was due prior to termination of his employment and should be set aside on grounds of failure to comply with agency due process standards. Accordingly, in order to deter future like arbitrary and capricious agency decision-making, the Court should grant Petitioner's Writ of *Certiorari*.

## CONCLUSION

Petitioner asks this Court to resolve whether the Due Process Clause permits an agency decision to be sustained where the evidence clear that the agency ignored its own regulations and procedures as well as the factual, legal and equitable matters submitted by an agency employee in Response to Notification of Proposed Termination prior to terminating an employee's Government employment. As provided herein, Petitioner respectfully asserts that the process followed by the agency in his case was fundamentally flawed and that a Writ of *Certiorari* should issue to correct the error of law committed by the agency and Court below.

Respectfully submitted,

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June 25, 2002

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NOTE: Pursuant to Fed. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

01-3225

RODNEY W. LAUCK,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

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**ENTERED: March 27, 2002**

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Before LOURIE, SCHALL and GAJARSA, Circuit Judges.

PER CURIAM.

DECISION

Rodney W. Lauck ("Lauck") appeals the decision of the Merit System Protection Board ("MSPB") dismissing the appeal of his termination

from the Department of the Army ("Army") based on Lauck's loss of membership in the United States Army Reserve ("USAR"). Lauck v. Dep't of the Army, No. CH-0752-0283-I-1 (MSPB July 11, 2000). Because the MSPB's dismissal of Lauck's appeal was not arbitrary, capricious, or an abuse of discretion and is otherwise in accordance with the law, we affirm.

On June 4, 1989, the Army appointed Lauck to a civilian position, Supervisory Aircraft Pilot. This was "dual status" or "military technician" appointment conditioned on the requirement that he maintain membership in the USAR. On November 2, 1998, the USAR discharged Lauck under other than honorable conditions, and on December 30, 1999, the Army terminated Lauck from his civilian position for failing to maintain USAR membership.

Lauck appealed his termination to the MSPB. On July 11, 2000, the MSPB's administrative judge ("AJ") dismissed Lauck's appeal. Lauck thereafter petitioned for review. On February 23, 2001, the MSPB affirmed the AJ's dismissal, finding Lauck offered no new, previously unavailable evidence and the initial decision contained no error in law or regulation affecting the outcome. Lauck timely filed this appeal.

Pursuant to 5 U.S.C. § 7703(c)(1)-(3) (2000), this court must affirm the MSPB unless its decision is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law rule, or regulation having been followed; or (3) unsupported by substantial evidence. Hayes v. Dep't of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984). Lauck bears the

burden of proving reversible error. Harris v. Dep't of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

The AJ concluded that the Army had established by a preponderance of the evidence that the reason for Lauck's loss of membership in the USAR was due to circumstances within his control, a requirement the AJ believed applied in Lauck's case. Army Regulation ("AR") Section II-8.e.1 lists actions within the military technician's control and includes "unsatisfactory military performance or conduct." "If a reservist loses active reserve status for a reason defined by the regulations as voluntary, we only look to see if the employee lost his reserve status for that reason." Jeffries v. Dep't of the Air Force, 999 F.2d 529, 532 (Fed. Cir. 1993).

Here, the USAR discharged Lauck for "Acts of personal misconduct." Lauck never disputes those underlying misconduct charges; he merely challenges the USAR discharge process and the resultant termination by the Army. Lauck's appeal asserts that the USAR denied Lauck minimal due process during the discharge proceedings, and therefore his loss of USAR membership was not for reasons within his control and could not constitute a failure to meet the condition of military technician employment under Amy AR 140-315 Section II-8.d.(1). The short answer to this argument is that even if Lauck was denied due process, "grounds for discharge from the reserves are not reviewable indirectly through the MSPB." Jeffries, 999 F.2d at 532. We therefore conclude that the MSPB did not err in dismissing Lauck's appeal.

The MSPB's decision is not arbitrary, capricious or an abuse of discretion. In addition, it is in accordance with the law and is supported by

substantial evidence of record. Thus, we affirm the decision of the MSPB.[1]

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1 We have reviewed Lauck's appeal based upon the decision of the MSPB. However, the Board was not required to determine, as it did, whether Lauck's loss of reserve membership was for reasons within his control. The requirement that loss of reserve membership be for reasons within the individual's control does not apply to a person, such as Lauck, who was appointed to a reserve position after December 8, 1983. See AR 140-315, Section II-8.d(2).

**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**
**CENTRAL REGIONAL OFFICE**

RODNEY W. LAUCK,
Appellant

v.

DEPARTMENT OF THE ARMY
Agency

DOCKET NUMBER
CH-0752-00-0283-I-1

**Entered: JULY 11, 2000**

Charles W. Gittin, Esquire, Middletown, Wisconsin, for the appellant.

Timothy D. Johnson, Esquire, Fort McCoy, Wisconsin for the agency.

BEFORE

Phillip Miller
Administrative Judge

## INITIAL DECISION

## INTRODUCTION

The agency removed the appellant from employment as a Supervisory Aircraft Pilot effective

December 30, 1999, for failure to maintain U. S. Army Reserve military membership, a condition of his employment. The appellant timely appealed his removal to the Board on January 27, 2000. The appeal is within the Board's jurisdiction pursuant to 5 U.S.C.A. §§ 7511-13 (West 1996). The hearing requested by the appellant was held on June 2, 2000.

The action is AFFIRMED.

## BACKGROUND

The appellant was a "dual status"[1] employee, one required to maintain Army Reserve membership in order to retain his civilian employment with the Army Reserves. The unit to which he was previously assigned was deactivated and on September 1, 1996, the appellant's civilian employment was transferred from Scott Air Force Base, Illinois to Fort McCoy, Wisconsin. At some time subsequent to his transfer, a military board was convened to hear charges[2] brought against the appellant. Apparently, as a result of the military board's findings, an October 1, 1998 discharge order effected the appellant's discharge from his military position "Under Other Than Honorable Conditions" as of November 2, 1998. Agency file, tab 4f.

By notice dated October 26, 1999, Major John J. Gallagher, Executive Officer, 244th Aviation Brigade, proposed the appellant's removal from his civilian

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1 "Dual status" is essentially synonymous with "military technician" as those terms are defined in Army Regulation (AR) 140-315.

2 Unspecified in the Board record.

employment for failing to maintain Army Reserve military membership. Be letter dated December 1, 1999, the appellant responded to the notice. On December 27, 1999, Col. Daniel J. McGraw, Commander, 244th Aviation Brigade, issued his decision finding the reason supported by the evidence and setting the effective date of the appellant's removal as December 30, 1999. The instant appeal followed.

## ANALYSIS AND FINDINGS

"Where an agency's action is based on an appellant's loss of active reserve status, which is a condition of employment, and applicable agency regulations define the reason for such loss as within the appellant's control, the Board's 'scope of inquiry' is limited to determining whether the appellant lost reserve status for that reason." *Butler v. Department of the Air Force,* 73 M.S.P.R. 313, 318 (1997); *Jeffries v. Department of the Air Force* 53 M.S.P.R. 35, 40 (1992), *aff'd,* 999 F.2d 529 (Fed. Cir. 1993); and *Talakowski v. Department of the Army,* 50 M.S.P.R. 18, 21 (1991). The agency must prove this reason by a preponderance of the evidence. 5 U.S.C.A. §7701(c)(1)(B) (West 1996).

The Notification of Personnel Action form documenting the appellant's appointment to a position as a flight instructor states: "AS A CONDITION OF EMPLOYMENT, YOU ARE REQUIRED TO MAINTAIN MEMBERSHIP IN THE USAR SELECTED RESERVE." Agency file, tab 4I. A similar statement is found on the Notification of Personnel Action form appointing the appellant to his position of Supervisory Aircraft Pilot effective September 1, 1996. Agency file, tab 4G. *See also* Army Regulation 140-315, Section 1-8,

Agency file, tab 4J. The appellant did not challenge the agency on this element. Accordingly, I find the agency has established that the appellant was obligated to maintain active Army Reserve membership to maintain his civilian employment with the Army Reserve.

During the hearing, the appellant testified that at some time after he transferred to Fort McCoy, he told Ms. Maureen Sullivan, Personnel Management Specialist, that he was "not maintaining [dual status]" and Ms. Sullivan told him not to worry about it. Tr. at 89. In closing, the appellant argued that the Army "waived" the dual status requirement. Ms. Sullivan denies having told the appellant that maintaining dual status was not required in his position but that she only told him he was not required to maintain Army Reserve membership in the particular unit in which he was employed. Tr. at 96. As a Personnel Management Specialist in an Army Reserve unit, Ms. Sullivan would have been well aware of the requirements for dual status and there is no reason for her to have given the appellant misleading information. I find the appellant's testimony lacking in credibility. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 462 (1987), *modified*, 54 M.S.P.R. 58 (1992), *rev'd and remanded on other grounds, sub nom. King v. Hillen*, 21 F.3d 1572 (Fed. Cir. 1994). I find no merit in the argument that Ms. Sullivan waived the appellant's regulatory requirement of dual status.

The fact that the appellant was discharged "Under Other Than Honorable Conditions" is likewise uncontroverted. The agency provided a copy of the October 1, 1998 Orders, 98-274-008, terminating all the appellant's Army Reserve and Army appointments. Agency file, tab 4F. I find that the agency has

established by preponderant evidence that the appellant lost his Army Reserve military membership.

Whether the loss of military reserve membership is "within the appellant's control" is defined by regulation and not by common usage. Army Regulation (AR) 140-315, section 2-8(e) sets forth those conditions considered to be within the technician's control. *See* Agency file, tab 4J. A discharge "Under Other Than Honorable Conditions" is not included in the list of conditions outside a technician's control. Accordingly, I find that the agency has established by preponderant evidence that the appellant's loss of Army Reserve membership was, by regulation, within his control.

Although the appellant acknowledged that he had not attended military reserve functions since his transfer to Fort McCoy, Wisconsin, in 1996, (Tr. 92-94) he stated he was not notified of the discharge proceedings against him and did not know he had been discharged until he was so informed in the notice proposing his civilian removal. The appellant asserts that the Army failed to afford him minimal due process in his military discharge because it failed to give him "actual" notice of the military proceedings against him and, therefore, he was not given an opportunity to respond to or defend against the charges for which he was discharged. Based on language found in *Thomas v. Department of the Army* 34 M.S.P.R. 678, 680 (1987), the appellant asserts the agency estopped from removing him from his civilian position because the Army

Reserve did not afford him minimal due process in his discharge from his reserve membership.[3]

In *Thomas*, the Board stated that it will consider "whether minimal due process was granted by the military" in the loss of a technician's reserve membership. *Id.* at 680. Under the appellant's interpretation of *Thomas*, a Board finding that the Army failed to afford the appellant minimal due process in effecting his discharge from the Army Reserve would require the agency to cancel his removal and retain him in his position, notwithstanding established Army regulations requiring his removal. The only apparent cure for this situation would be for the Army to reconvene military discharge procedures in accordance with Board requirements. Such an interpretation would interfere in internal military matters *See Thomas v. Coffey*, 618 F.2d 686, 691 (10th Cit. 1980) ("the courts also have a strong policy of avoiding interference in internal military matters"). Moreover, if the employee believes he was denied minimal due process, he may appeal that matter within military channels. *See* Army Regulations 135-175, chapter 1, ¶ 12, record at tab 20.

The element of proof set forth in *Thomas*, is applicable to cases in which an agency revokes or

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[3] Agency records indicate that notice of the military discharge board hearing was mailed to the three available addresses for the appellant and that his representative in the proceeding "also contacted the counsel representing the respondent in the civilian proceedings stemming from the underlying misconduct that was the [basis] for the board and advised him of the time and place of the board." Agency file, tab 4E. The appellant's assertion that he was not aware he had been discharged despite his failure to attend training sessions from September 1, 1996, through the date of his discharge from his civilian position, is inherently improbable.

suspends the security clearance of an employee required for his civilian position. *See Holley v. Department of the Navy,* 62 M.S.P.R. 300, 304 (1994); *McGinn v. Department of the Navy,* 62 M.S.P.R. 273, 275 (1994); and *Pangarova v. Department of the Army,* 42 M.S.P.R. 319, 322 (1989). There is no law, rule, or regulation providing for Board review of any aspect of a military discharge and the Board's findings in *Thomas* did not require a determination of whether he was afforded minimal due process in his loss of reserve membership. Neither has the Board reiterated such a requirement in subsequent cases. *See Butler v. Department of the Air Force,* 73 M.S.P.R. 313, 318 (1997); *Jeffries v. Department of the Air Force,* 53 M.S.P.R. 40 (1992); *Talakowski v. Department of the Army,* 50 M.S.P.R. 18, 21 (1991); *Cf. Jeffries v. Department of the Air Force,* 999 F.2d 529 (1993); and *Buriani v. Department of the Air Force* 777 F.2d 674 (1985). Thus, I find the Board's reference to its review of the process involved in the loss of reserve membership constitutes dictum and not an element of proof required by the agency.

As noted by the Board in *Schaffer v. Department of the Air Force,* 9 M.S.P.R. 305 (1981), the United States Supreme Court in *Tennessee v. Dunlap,* 426 U.S. 312, 96 S.Ct. 2099, 48 L.Ed.2d 660 (1976) held that a military technician in the National Guard, removed for failing to maintain Guard membership, did not have a right to a review of the due process by which he was denied reenlistment in the Guard. The Court found Dunlap had "no foundation for any due process claim in this case, since the property interest [his civilian employment] creates in continued employment is confined in all events, to the guardsman's term of enlistment." *Dunlap* at 312. In *Orloff v. Wiloughby,* 345

U.S. 83, 93-94; 73S.Ct. 534, 539-40 (1953), the United States Supreme Court held that courts have no authority to review the denial of a military appointment and stated: "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to intervene in judicial matters."

Based on my review of the applicable precedent, I decline to further consider the appellant's claim that he was denied minimal due process when the Army discharged him from his Army Reserve military position. I find the agency has supported its reason for removal of the appellant by a preponderance of the evidence.

Affirmative Defenses

The appellant has alleged a number of harmful procedural errors occurred in his removal from his civilian position. Harmful error is defined as:

> Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

5 C.F.R. § 1201.56 (c)(3) (2000).

The appellant asserts the agency erred in removing him because "the Department of the Army... had placed a 'hold' on 'ALL' removals of Military Technicians due to loss of reserve membership." Record, tab 12 at 7-8. In support for his assertion, he referred to a December 10, 1999 email from Maureen Sullivan, Personnel Management Specialist, to a Barbara Shutock addressing an email message Ms. Sullivan received from Kim Meyer, Chief Military Technician program Division, Fort McCoy, Wisconsin. Appellant's exhibit K, Record at tab 7. Chief Meyer's message which was forwarded to Ms. Shutock with her comment follows:

> Another change: Based on meeting yesterday with Mr. Thomas, Doug Gray, Gloria Mitchell and myself, hold ALL removals of MT's due to loss of reserve membership. Until we get TJAG opinion regarding these removals, we will hold them. Please notify commands as appropriate. Questions can be referred to Doug Gray at USARC as necessary. More to follow as we get it. Thanks.

Ms. Sullivan's statement to Ms. Shutock reads:

> Another hold on Lauck,
>
> I have the letter written and will be able to forward it when we get the TJAS opinion.

I find no merit in this argument. The communication is not a Department of the Army order

but only referred to a discretionary review of removal actions by an agency internal review panel. Such a review is not a requirement, although the email states on its face the appellant's removal was being held until the action was afforded such a review. I find the appellant has not shown by preponderant evidence the agency erred in failing to place his removal on "hold."

The appellant asserts the agency erred in that it did not provide him prior counseling and a reasonable opportunity to correct the deficiency before it issued the proposal notice as allegedly required by AR 690-700. The appellant did not provide a copy of the regulations he cites. In the absence of a copy of the regulation or more specific information, I find this to be a frivolous allegation unworthy of further consideration. I find the appellant has not shown by a preponderance of the evidence the agency committed harmful error in violation of AR 690-700.

The appellant further alleges he was entitled to up to six months in which to reaffiliate with the Army Reserve before their employment is terminated under the Defense Authorization Act (DDA) of 2000[4]. Record at tab 12. The specific provision referenced by the appellant is 10 U.S.C. § 10218. That provision states: "An individual employed by the Army Reserve or the Air Force Reserve as a military technician (dual status) who after the date of the enactment of this section loses dual status is subject to paragraph (2) or (3), as the case may be." This new provision to the Code was enacted on October 5, 1999. 10 U.S.C.A. § 10218(a) (West Supp. 2000). Because the appellant lost his dual status at the time of his discharge from the Army Reserve on November 2, 1998, I find he lost his dual status prior to

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4 The appellant incorrectly referred to the year 2001.

the effective date of the DDA and that the provisions thereof are inapplicable to his situation.

The appellant asserts that he was harmed in that the deciding official, Col. McGraw, did not see or consider his response to the proposal notice. Mr. Johnson asked Col. McGraw during deposition if he had ever seen the appellant's written response to the proposal notice. Col. McGraw responded that he did not recall having seen the document. No follow-up or clarifying questions were asked. Record at tab. 14, Appellant's Exhibit H, at 17 and Deposition Exhibit 10. During the hearing, Col. McGraw testified that he did review the document but that around the period of the deposition he was preoccupied with other matters and had not reviewed the appellant's removal file until after the deposition. Tr. At 40-41.

Notwithstanding Col. McGraw's deposition testimony, after considering evidence on this issue, I find that he did review and consider the appellant's response to the proposal notice prior to making his decision to remove the appellant. The response was addressed to Col. McGraw and Major Gallagher and was contained in the agency's adverse action file. It was received prior to the date of the decision document, and it was referenced in Col. McGraw's decision letter. I find it more likely true than not that he in fact saw and considered the response prior to making his December 27, 1999 decision to remove the appellant but that he did not recall the document when it was shown to him on April 4, 2000. Further, the appellant's removal was proposed for his failure to meet a condition of his employment and nothing in the response warrants a decision other than the one made by Col. McGraw. Thus, even if Col. McGraw erred in

failing to consider the response, I find the appellant has not shown by preponderant evidence that consideration of the response would have produced a different result.

In his initial appeal, the appellant alleged his removal was in retaliation for disclosures protected under the Whistleblower Protection Act (WPA). He did not withdraw or pursue this allegation at the hearing. To prove a prima facie case of retaliation for whistleblowing, the appellant must prove by preponderant evidence that: (a) he made a disclosure protected by 5 U.S.C. § 2302(b)(8); and (b) it was a contributing factor in the personnel action being appealed. If the appellant meets this burden, the agency must prove by clear and convincing evidence that it would have taken the same action even absent the disclosure. *See Horton v. Department of the Navy,* 66 F.3d 279, 283-84 (Fed. Cir. 1995), cert. denied, 516 U.S. 1176 (1996).

The threshold question is an allegation of WPA reprisal is whether the appellant made a protected disclosure. A protected "disclosure" is defined as any disclosure of information by an employee that the employee "reasonably believes" evidences (a) a violation of any law, rule, or regulation or (b) gross mismanagement, a gross waste of funds, an abuse or authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). The label that an appellant chooses to place on a disclosure is not determinative of its sufficiency under 5 U.S.C. § 2302(b)(8). The true measure of whether the document is a protected disclosure is its content and the reasonableness of the appellant's belief that it

evidences wrongdoing. *Williams v. National Labor Relations Board,* 59 M.S.P.R. 640, 645. (1993).

The appellant claims a September 27, 1999 letter he wrote to the Department of Defense Inspector General constituted a protected disclosure. That letter sets forth several complaints about the way the appellant was treated by his superiors. Appeal exhibit 4. He complained about being ordered to take a flight physical shortly after having passed such a physical, his suspension for failing to report for the examination, the failure of the agency to decide within 30 days a grievance filed over his suspension, the denial of refresher training for the appellant, being instructed to back-date his performance evaluation, and his suspension for leaving a conference early.

All of the "disclosures" by the appellant address the actions by the agency which affect only the appellant. None reveals a violation of any law, rule or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Accordingly, I find none of the matters he complained about rise to the level of a disclosure protected by the WPA and that the appellant has not alleged facts sufficient to constitute the affirmative defense of reprisal for protected disclosures. Even if they could possibly be construed as disclosures, the Army regulations mandating removal of dual status employees who fail to maintain Army Reserve membership constitute clear and convincing evidence that the agency would have taken the action regardless of whether the disclosures were made.

Efficiency of the service - Nexus

"[A]n agency may take an action covered by [subchapter 75 or title 5 of the United States Code] against an employee only for such cause as will promote the efficiency of the service." 5 U.S.C.A. § 7513 (West 1996).

> Before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of the factors relevant to promotion of service efficiency in the individual case. Thus, while the efficiency of the service is the ultimate criterion for determining both whether any disciplinary action is warranted and whether the particular sanction may be sustained, those determinations are quite distinct and must be separately considered.

*Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 303, (1981). A nexus exists between an adverse action and the efficiency of the service when the grounds for the action relate to either an employee's ability to accomplish assigned duties, satisfactorily or to some other legitimate government interest. *Hatfield v. Department of the Interior,* 28 M.S.P.R. 673, 675 (1985).

I find the nexus between the appellant's civilian and military service is established by the regulations requiring him to maintain military reserve status in order to retain his civilian position.

Efficiency of the service - Penalty

Although Col. McGraw reviewed and considered the factors set forth in *Douglas,* the reason for the appellant's removal was his failure to maintain a condition of employment. Because the appellant's removal from his position was dictated by Army regulation and allowed Col. McGraw no alternative but to remove the appellant from his position of Supervisory Aircraft Pilot, I find consideration of the *Douglas* factors is inapplicable here. I further find that the appellant has not shown that he was entitled by law, rule, or regulation to some other position within the organization or any other accommodation.

## DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/s/_____

Phillip Miller

Administrative Judge

## NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. §1201.112(a)(5).

## NOTICE TO APPELLANT

This initial decision will become final on **August 15, 2000**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

## BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with: